Oct. 5, 2001

Supreme Court, U.S.
FILED
OCT 5 2001
OFFICE OF THE CLERK

No. 00-6029

IN THE

Supreme Court of the United States

TRACY RAGSDALE, *et al.*,
Petitioners,

v.

WOLVERINE WORLD WIDE, INC.
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, LPA, INC. AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF RESPONDENT

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The Equal Employment Advisory Council, LPA, Inc., and the Chamber of Commerce of the United States respectfully submit this brief *amici curiae*.[1] The written consent of all parties has been filed with the Clerk of this Court. The brief urges this Court to affirm the decision below and thus supports the position of Respondent Wolverine World Wide, Inc. before this Court.

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership now includes 360 of the nation's largest private sector companies, collectively providing employment to more than 17 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

LPA, Inc. (LPA) is a public policy advocacy organization representing corporate executives interested in human resource policy from more than 200 leading corporations doing business in the United States. LPA's purpose is to provide in-depth information, analysis, and opinion of current situations and emerging trends in labor and employment policy. Collectively, LPA members employ over 19 million people worldwide and over 12 percent of the U.S. private sector workforce. LPA member companies have revenue exceeding $4.3 trillion annually.

The Chamber of Commerce of the United States (the Chamber or the Chamber of Commerce) is the world's largest business federation, representing an underlying membership of nearly three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's and LPA's member companies, as well as many of the Chamber of Commerce's member companies, are employers subject to the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601 *et seq*. Many of these companies have leave policies more generous than any policies that merely comply with the requirements under the FMLA. For these reasons, EEAC, LPA, the Chamber of Commerce, and their members have an ongoing interest in any statute or regulation that serves to discourage employers from adopting or retaining more generous leave policies.

As such, the issue presented in this appeal is extremely important to the nationwide constituency that EEAC, LPA, and the Chamber of Commerce represent: whether the U.S. Department of Labor (DOL) Secretary acted permissibly in providing by regulation that (with certain exceptions) employer-provided leave does not count against the FMLA's 12-week entitlement until the employer notifies the employee of its designation as FMLA leave.

EEAC, LPA, and the Chamber of Commerce thus have an interest in, and a familiarity with, the legal and public policy issues presented to the Court in this case. Furthermore, because of their significant experience in these matters, EEAC, LPA, and the Chamber of Commerce are uniquely situated to brief this Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioner Tracy Ragsdale (Ragsdale) began her employment with Respondent Wolverine World Wide, Inc. (Wolverine) on March 17, 1995. In February 1996, she was diagnosed with cancer, and on February 21, 1996, she requested medical leave from Wolverine. Wolverine granted her request, and Ragsdale's leave commenced on that date. Pet. App. at 2.

Wolverine's leave policy allowed employees with six months of service to take leave for up to seven months. Ragsdale requested and was granted (in approximately 30 day increments) leave for seven months. Wolverine did not, however, notify Ragsdale of her eligibility for leave under the FMLA or her right to have leave designated as FMLA leave. Following the exhaustion of her eligibility for leave pursuant to Wolverine's policy and due to her continuing inability to return to work, Ragsdale was terminated from her employment with the company on September 20, 1996. *Id.* On September 26, 1996, Ragsdale requested that Wolverine grant additional FMLA leave. Pet. App. at 2-3. She was informed that she had requested and utilized all of her available leave. Ragsdale was released to return to work in December 1996. Pet. App. at 3.

On December 22, 1997, Ragsdale filed suit in the United States District Court for the Eastern District of Arkansas alleging, *inter alia*, a violation of the FMLA. On November 3, 1998, the district court granted summary judgment to Wolverine on Ragsdale's FMLA claim. Subsequently, Ragsdale filed an appeal in the U.S. Court of Appeals for the Eighth Circuit. The Eighth Circuit upheld the district court and found that the DOL notice regulations—which provide that unless the employer prospectively designates company leave as FMLA leave, the twelve week FMLA leave entitlement does not begin to run—are based on an erroneous interpretation of the FMLA and cannot be enforced. *Id.* Ragsdale petitioned this Court for a writ of *certiorari*, which was granted.

SUMMARY OF ARGUMENT

The FMLA unambiguously limits protected leave to a *total* of twelve weeks in any twelve-month period. *See* 29 U.S.C. §§ 2612(a)(1); (d)(1); and (d)(2). The DOL notice regulations effectively create an entitlement to an additional twelve weeks of leave whenever an employer fails to notify an

employee that the employee is using FMLA leave. This is directly inconsistent with the plain language of the statute and its legislative history. Therefore, in applying *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984), to the DOL notice regulations, the Court should determine that Congress' intent is clear; thus, the contrary regulations are not entitled to deference.

Even should the Court determine that the FMLA is silent or ambiguous on the issue, the DOL notice regulations are still invalid as they are "manifestly contrary to the statute." *Id.* at 844. The FMLA does not in any way suggest that the twelve-week entitlement may be extended. Where Congress wanted explicit notice provisions with significant consequences, it provided for them in the FMLA. Furthermore, adequate alternative safeguards exist to ensure that employees know of their rights granted by the FMLA.

Unfortunately, the DOL notice regulations discourage employers from adopting or retaining leave policies more generous than the FMLA requires, because the notice regulations punish employers who provide more generous plans with federal lawsuits simply because those employers failed to comply with an administratively-created technical notice requirement. Thus, rather than providing additional leave, employers may choose simply to give employees only the federal entitlement, thereby eliminating the administrative obstacles to providing additional worthwhile benefits to employees. This is clearly contrary to what the statute sought to encourage. For these reasons, the Court should uphold the judgment below with the direction that the DOL notice regulations are invalid and cannot be enforced.

ARGUMENT

I. IN APPLYING THE *CHEVRON* STANDARD TO THE FMLA NOTICE REGULATIONS, THE COURT SHOULD DETERMINE THAT CONGRESS' INTENT IS CLEAR; THUS, THE CONTRARY REGULATIONS ARE NOT ENTITLED TO DEFERENCE.

A. The Plain Language of the FMLA Unambiguously Limits Protected Leave to Twelve Weeks in Any Twelve-Month Period.

The FMLA unambiguously limits protected leave to a *total* of twelve weeks in any twelve-month period for the employee's serious health condition, for a family member's serious health condition, or for the birth of a son or daughter or the placement of a son or daughter with the employee for adoption, or foster care. 29 U.S.C. § 2612(a)(1).

In Section 2612(d)(1) of the FMLA, Congress set forth the relationship between the federal leave entitlement and voluntary employer-provided leave policies, further confirming that the statute entitles an employee to a maximum of twelve weeks of protected leave:

> If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the *12 workweeks of leave required under this subchapter* may be provided without compensation.

29 U.S.C. § 2612(d)(1) (emphasis added).

The DOL notice regulations effectively create an entitlement to an additional twelve weeks of leave whenever an employer fails to notify an employee that the employee is using FMLA leave. This is directly inconsistent with the plain language of the FMLA, which makes clear that eligible employees are entitled to a total of twelve weeks of leave. *See* 29 U.S.C. §§ 2612(a)(1) and (d)(1). Thus, the FMLA sets

both a minimum term of leave that employers must provide to employees and a *maximum* term that the statute requires. *See Ragsdale v. Wolverine World Wide, Inc.*, 218 F.3d 933, 937 (8th Cir. 2000), *cert. granted*, 121 S. Ct. 2548 (2001); *McGregor v. Autozone, Inc.*, 180 F.3d 1305, 1308 (11th Cir. 1999).

Section 2612(d)(2) of the FMLA provides additional support for the position that the DOL notice provisions are invalid. Section 2612(d)(2)(A) states that:

> In general. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under [the FMLA] . . . for any part of the 12 week period of such leave . . . .

29 U.S.C. § 2612(d)(2)(A).

The purpose underlying 29 U.S.C. § 2612(d)(2) is to protect employers who offer paid sick leave benefits to their employees from having to provide both those paid leave benefits and the twelve weeks of leave required by the FMLA separately. *See Strickland v. Water Works & Sewer Bd.*, 239 F.3d 1199, 1205 (11th Cir. 2001); *Ragsdale*, 218 F.3d at 938. Congress intended that the FMLA provide employees with a minimum entitlement of twelve weeks of leave, while protecting employers against employees tacking their FMLA entitlement on to any paid benefit offered by the employer. Thus, while the FMLA requires employers to provide a total of twelve weeks of leave during a twelve-month period for the reasons specified in the statute, it does not require an employer to provide more.

Section 2612(d)(2) does not say that an employer who fails to designate an employee's paid vacation leave, personal leave, family leave, or sick leave as FMLA leave waives the right to substitute such leave for FMLA leave. Nor does the statute impose any requirement of advance designation of

leave as FMLA leave. The express language of the statute itself "does not impose any specific requirements for the type of notification an employer must provide or when that notification must occur." *McGregor*, 180 F.3d at 1307.

In sum, although DOL perceives "FMLA leave" as separate and distinct from any other leave that an employer may provide, such a characterization is found nowhere in the statute. The term itself is a creature of the regulations. An employer who provides an employee with at least twelve weeks of leave for any FMLA-covered purpose cannot violate the Act, regardless of what the leave is labeled.

B. The FMLA's Legislative History Clearly Reveals That Congress Intended That Employees Receive No More Than Twelve Weeks of Protected Leave Under the Statute.

A review of the FMLA's legislative history clearly reveals that Congress was extremely cognizant that it was providing a maximum of twelve weeks of protected leave under the statute. Indeed, Senator Edward Kennedy, a strong proponent of the FMLA, commented in debate on the Senate floor that, "[c]ompared to laws in other countries, this legislation is a modest response to the urgent needs of working families. Canada provides 15 weeks of family leave and twelve weeks of medical leave with the Government paying 63 percent of the cost. The West German Government pays 100 percent of the cost of 19 weeks of family leave for its workers." 137 Cong. Rec. S14147 (daily ed. Oct. 2, 1991).

The FMLA, when originally introduced, did propose to provide employees with much more protected leave, up to 18 weeks of family leave and 26 weeks of disability leave. 139 Cong. Rec. H389 (daily ed. Feb. 3, 1993). Twelve weeks, therefore, was not a random figure but rather the product of years of debate and compromise. *See also* H.R. Rep. No. 102-135, pt. 1, at 37 (1991) ("The amount of time available

for leave also reflects a compromise. The leave period was reduced to 12 weeks in response to concerns raised by employers who maintained that it was significantly easier to adjust work schedules or find temporary replacements over the shorter time period. While not ideal from the employees' perspective, a twelve week minimum represents a middle ground between the family needs of workers and an employer's business needs."). Hence, a construction of the statute that entitles employees to *more* than twelve weeks of leave runs afoul of Congressional intent.

C. The FMLA Notice Regulations Extend FMLA-Protected Leave Beyond Twelve Weeks and Therefore Deserve No Deference Under *Chevron*.

When a statute is silent or ambiguous on a precise question at issue, regulations promulgated by the agency empowered to address the question are entitled to deference. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). However, regulations that address an issue already unambiguously addressed by the statute are entitled to no deference. As the *Chevron* Court emphatically stated:

> First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

Id. (footnote omitted).

In other words, "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect," and "the judiciary . . . *must* reject administrative constructions which are contrary to clear congressional intent." *Id.* at 843 n.9 (emphasis added). *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987).

Notwithstanding the unambiguous twelve week statutory entitlement, DOL promulgated a regulatory scheme that directly contradicts the statutory limit. The notice regulations, 29 C.F.R. §§ 825.208(c) and 825.700(a), unequivocally purport to provide certain employees with more than twelve weeks of FMLA-protected leave. The statute, however, is *not* silent on this issue: Congress established—with a specific numerical integer—precisely how much leave is *protected by the FMLA*—twelve weeks. DOL's notice regulations, which effectively extend FMLA protection to leave taken in excess of twelve weeks, are contrary to the plain language of the statute and congressional intent. As a result, this Court should not give deference to the DOL notice regulations.

II. EVEN IF IT DETERMINES THAT THE FMLA IS AMBIGUOUS, THE COURT SHOULD NOT DEFER TO THE AGENCY INTERPRETATION, AS IT IS MANIFESTLY CONTRARY TO THE STATUTE.

A. The Eighth Circuit Correctly Determined That the FMLA Notice Regulations Create Rights Which the FMLA Clearly Does Not Confer.

As the *Chevron* Court explained, even where the statute is silent or ambiguous on a particular issue, implementing regulations addressing that issue nonetheless are invalid if they are "manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. This prong of the *Chevron* doctrine, therefore, prohibits DOL from seizing on a purported ambiguity or silence in one section of the statute by issuing a regulation that fundamentally contradicts a separate and distinct statutory provision. *See, e.g., Whitman v. American Trucking Ass'ns*, 531 U.S. 457, __, 121 S. Ct. 903, 918-19 (2001).

Thus, even if, as Ragsdale contends, the statute is silent regarding notice, the Secretary cannot, under *Chevron*, flesh out this silence in such a way as to contradict the statute on a

separate issue that is addressed precisely and clearly—*i.e.*, the total extent of leave protected by the FMLA.

Although the statutory silence cited by Ragsdale *might* permit DOL to promulgate some regulation on "notice" of FMLA leave, it clearly does not permit DOL to issue *this regulation* that creates a leave entitlement in excess of the congressionally established limit. The DOL notice regulations "create rights which the [FMLA] clearly does not confer." *Ragsdale*, 218 F.3d at 939. Thus, however this argument is framed under *Chevron*, it is clear that DOL exceeded its authority.[2]

Numerous courts in addition to the Eighth Circuit have confirmed that the FMLA only protects twelve weeks of leave. In *Santos v. Shields Health Group*, 996 F. Supp. 87 (D. Mass. 1998), the court reasoned that any deficiency in employer-provided notice could not serve to extend FMLA protection past twelve weeks.

> The bottom line is that [the plaintiff] received more than that to which she was entitled under the FMLA, to wit, twelve workweeks of leave. In the context of this case, any inadequacy found to exist with respect to advising the plaintiff of her rights and obligations under the Act does not change this basic fact.

Id. at 93.

Other courts analyzing the FMLA's statutory provisions likewise have concluded that employers who fail to designate

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[2] The same conclusion holds under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), as this Court should conclude that the "validity of [DOL's] reasoning" lacks the "power to persuade" in that the agency exercised an "informed judgment" to which deference is owed. *Id.* at 140. DOL cannot contradict what is clearly provided for in the FMLA—the "total" extent of leave protected by the statute is twelve weeks. Any argument advanced for exceeding the congressionally established limit in the notice regulations cannot be deemed persuasive and based on a reasoned judgment.

leave as FMLA leave—but who provide the twelve-week leave entitlement—do not violate the FMLA. *See, e.g., McGregor*, 180 F.3d at 1307-08; *Fulham v. HSBC Bank USA*, __ F. Supp.2d __, 2001 U.S. Dist. LEXIS 13570, *23 (S.D.N.Y. Sept. 4, 2001); *Twyman v. Dilks*, 6 Wage & Hour Cas. 2d (BNA) 550, 560 (E.D. Pa. 2000); *Schloer v. Lucent Techs., Inc.*, 6 Wage & Hour Cas. 2d (BNA) 345 (D. Md. 2000); *Neal v. Children's Habilitation Ctr.*, 5 Wage & Hour Cas. 2d (BNA) 1278, 1280 (N.D. Ill. 1999); *Covey v. Methodist Hosp. of Dyersburg, Inc.*, 56 F. Supp.2d 965, 969-70 (W.D. Tenn. 1999). This Court should recognize the sound reasoning of these lower courts and conclude that the DOL notice regulations improperly convert the FMLA's minimum federally mandated unpaid leave into an entitlement to an additional twelve weeks of leave unless the employer provides the notification.

B. Where Congress Wanted Explicit Notice Provisions with Significant Consequences, It Provided for Them in the FMLA.

The FMLA does not in any way suggest that the twelve-week FMLA entitlement may be extended. Moreover, as the Eighth Circuit noted in this case, other sections of the FMLA strongly support the view that where Congress desired explicit notice provisions with significant consequences for their violation, it provided for them in the text of the statute.

In 29 U.S.C. § 2612(e)(1), the FMLA details notice obligations of employees to employers when requesting FMLA-qualified leave. In 29 U.S.C. § 2614(b)(1)(A), the FMLA allows an employer to refuse to restore a "highly compensated employee" to his or her former position if holding open the position would cause "substantial and grievous economic injury to the operations of the employer." In order to do so, however, the employer must give notice to the employee "at the time the employer determines such injury would occur" that the employer does not intend to

restore the employee to his or her position. *See* 29 U.S.C. § 2614(b)(1)(B). In addition, 29 U.S.C. § 2619 assesses monetary penalties for employers who do not post notices on the premises of the employer explaining FMLA rights.

If Congress had intended to harshly penalize employers who fail to designate leave as FMLA leave, it would have explicitly stated so in the statute. Congress "did not intend to construct a trap for unwary employers who already provide for twelve or more weeks of leave for their employees." *Ragsdale*, 218 F.3d at 940. DOL's notice regulations are not consistent with the purpose of the FMLA.

C. Adequate Alternative Safeguards Exist To Ensure That Employees Know of Their Rights Granted by the FMLA.

Adequate alternative remedies are available to employees who justifiably rely to their detriment on additional employer-provided leave. The FMLA explicitly provides that:

> Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.

29 U.S.C. § 2652.

The regulations further provide that "[a]n employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA." 29 C.F.R. § 825.700(a).

Thus, the statute and regulations make it clear that employees have recourse under state or, in the case of collective bargaining agreements, federal contract law. Dis-

putes regarding leave rights in *excess of the FMLA entitlement*, however, do not state a claim under the FMLA.

As the court in *Rich v. Delta Air Lines*, 921 F. Supp. 767 (N.D. Ga. 1996), explains:

> The plaintiff apparently construes this section to mean that when an employer has an employee benefit program or plan that is more generous than the benefits provided by the FMLA, then the employee automatically has a cause of action, *under the FMLA*, to enforce the terms of the program or plan if the employer deviates from such a program. [The regulation] does not, and could not, however, create a federal cause of action under the FMLA to enforce voluntary employer policies of providing benefits that exceed those required by the FMLA.
>
> . . .
>
> [T]he regulation is merely a truism, which emphasizes that employers are legally bound by valid contractual agreements made with their employees regarding employment benefits. An employer's contractual obligations are distinct from . . . the FMLA itself.

921 F. Supp. at 773 (emphasis added).

As the *Rich* decision correctly recognizes, not all disputes must be resolved through federal FMLA lawsuits.

Moreover, in appropriate circumstances, federal courts would be justified in using their equitable powers to estop employers from asserting that excess employee leave was not protected by the FMLA. For example, where the employer allegedly misleads an employee into believing that leave will be protected, a court might reasonably permit a suit to proceed under the FMLA on equitable grounds. *See Ragsdale*, 218 F.3d at 939-40 (describing scenarios where an employer's failure to provide notice may interfere with an employee's substantive FMLA rights). This is far different than the DOL regulations at issue in this case, which

essentially require courts *per se* to estop defendants who have not specifically designated leave as "FMLA leave," regardless of the equities of the case.

The folly of the DOL approach is that it suggests an employee with a serious health condition can plan whether or not he or she remains sick. If an employee is able to perform the essential functions of the job, he or she should return to work. On the other hand, if the employee is not able to work, he or she must remain out of the workplace, regardless of how much protected leave exists. Such an individual could not have "planned" his or her leave so as not to exceed the twelve week limit, nor could such an individual have "unwittingly" given up his or her FMLA rights by remaining on leave in excess of twelve weeks. Such an individual *necessarily must* take leave because he or she is incapable of performing the job. *See, e.g., Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155, 161-62 (2d Cir. 1999) (because leave was necessitated by an unanticipated medical condition, and because employee's inability to return to work continued well beyond twelve weeks of leave, the court found it impossible for employer's alleged failure to give proper notice to have interfered in any way with the employee's exercise of FMLA rights). Clearly, applying the DOL notice requirements in such circumstances is nothing short of irrational.

III. THE FMLA NOTICE REGULATIONS DISCOURAGE EMPLOYERS FROM ADOPTING OR RETAINING LEAVE POLICIES MORE GENEROUS THAN THE FMLA REQUIRES.

When passing the FMLA, Congress recognized that many employers already provided leave for employees, in many cases greater than that provided for by the FMLA. In an attempt to preserve this status quo, Congress explicitly stated in the FMLA that:

> Nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act.

29 U.S.C. § 2653.

Unfortunately, DOL's notice regulation serves to accomplish exactly what this statutory section prohibits: it serves to discourage employers from providing more generous leave policies.

Congress designed the FMLA to achieve two principal goals: to encourage employers voluntarily to establish and maintain generous family and medical leave policies; and to provide employees who are not covered by such policies with a minimum employment standard for unpaid leave. *See* 29 U.S.C. § 2601(b). *See also* S. Rep. No. 103-3, at 3-5 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 5-7. The statute was never intended to be used to punish employers who provide more generous plans with federal lawsuits simply because those employers failed to comply with an administratively-created technical notice requirement.

The legislative history clearly reveals Congress' intentions. The FMLA "accommodates the important societal interest in assisting families, by establishing a minimum labor standard for leave." S. Rep. No. 103-3, at 4 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 6. The statute "is based on the same principle as the child labor laws, the minimum wage . . . and other labor laws that establish *minimum* standards for employment." *Id.*, *reprinted in* 1993 U.S.C.C.A.N. at 6-7. (emphasis added). Congress drafted the FMLA "to provide a security net for families by setting a minimum employment standard for unpaid leave that is required on the basis of medical necessity," *Johnson v. Primerica*, 3 Wage & Hour Cas. 2d 109, 111 (S.D.N.Y. 1996) (emphasis added).

As is the case with all other minimum labor standards legislation, the FMLA was not intended to discourage or

punish those employers—such as the one in this case—that voluntarily exceeded their legal obligations. In passing the FMLA, Congress was particularly mindful to point this out. Indeed, Senator Coats, a supporter of the FMLA, commented on the rationale for passing the FMLA:

> While this legislation is not a perfect solution, indeed, I had hoped for many years that it would not have been necessary, it represents a sincere attempt to address the needs of business and working families. To remain competitive in the global economy, to recruit and retain good employees and to improve productivity, particularly in a time of growing labor shortages, employers have recognized the need to offer more attractive benefits to its [SIC] employees. *Many already offer plans similar to the one in this legislation and those employers should be commended. However, there are those employers who have policies that are not only unfavorable to families, but are actually hostile toward families. Those are the employers we are trying to reach with this legislation.*

138 Cong. Rec. S1298 (daily ed. Aug. 11, 1992) (emphasis added).

The report of the House Committee on Education and Labor also indicated that the purpose of enacting the FMLA was not to present additional burdens to those companies that already provided leave to their employees, but to protect those employees who worked for companies that did not have such policies. In reviewing studies that analyzed the number of companies that did provide leave for employees prior to the enactment of the FMLA, the committee noted:

> These studies, taken together, indicate that while many employers are providing family and medical leave to their employees, a significant percentage of employers of all sizes have yet to adopt such policies.

H.R. Rep. No. 103-8, pt.1, at 28 (1993).

Unfortunately, it is the unsuspecting "good" employer—*i.e.*, the one with a generous (often paid) company leave policy—that will fall into DOL's regulatory web. The employer in this case presents a perfect example. Since Ragsdale lacked the minimum year of service required for eligibility for FMLA leave, Wolverine could have terminated her employment, but it did not. Instead, it gave her seven months of leave, more than twice the FMLA requirement. In DOL's view, Wolverine's generosity placed it in violation of the FMLA. Congress clearly did not intend this result.

By requiring employers to grant employees twelve weeks of leave in addition to their standard leave policies in the event the employer fails to designate an employee's initial leave period as "FMLA covered," DOL's regulation discourages employers from adopting or retaining more generous leave policies. Indeed, an employer has no incentive to provide leave to employees in excess of the federally mandated twelve weeks of leave when it is prohibited from counting such leave towards an employee's FMLA entitlement simply because it failed to designate the leave as "FMLA covered" up front. Thus, rather than providing additional leave, employers may choose simply to give employees only the federal entitlement, thereby eliminating the administrative obstacles to providing worthwhile benefits to employees. DOL's position provides a classic example of the adage "no good deed goes unpunished."

DOL's regulations contain sufficient safeguards to alert employees as to their rights under the FMLA. Section 825.300 of DOL's regulations requires that employers post in conspicuous locations a notice that explains an employee's rights under the FMLA. 29 C.F.R. § 825.300. In addition, 29 C.F.R. § 825.301 requires employers to supplement any written guidance employers make available to employees with an explanation of the employer's policy pertaining to the FMLA. Therefore, an employee cannot claim to be unaware

of his or her rights under the FMLA if an employer complies with these regulatory mandates.

DOL essentially argues that to designate leave as FMLA leave "up front" is a *de minimis* burden for employers. Apparently, it does not appreciate the paperwork burden this requirement generates for employers with thousands—let alone hundreds of thousands—of employees, any number of whom may be taking leave at any given moment. DOL's regulations specifying what constitutes adequate notice, create a complex administrative web of compliance obligations riddled with ifs, ands, and buts, all creating pitfalls for the unsuspecting employer. *See generally*, 29 C.F.R. § 825.208(a)-(e); 29 C.F.R. § 825.301(a)-(f). For example, one section steers the employer through its obligation to interrogate an employee (or an employee's representative) who has requested leave that sounds like it might be covered by the FMLA, since the employee need not actually name the statute to gain its protection. 29 C.F.R. § 825.208(a)(1) and (2). Another outlines the distinction between a "preliminary" and "final" designation. 29 C.F.R. § 825.208(e)(2). Still another outlines the seven other topics on which DOL requires an employer to give notice, in addition to designating the leave as FMLA-covered. 29 C.F.R. § 825.301(b)(1)(ii), (iii), (iv), (v), (vi), (vii), and (viii). DOL allows an employer only two business days to make the designation. 29 C.F.R. § 825.208(b)(1). Oral notice must be followed by written notice. 29 C.F.R. § 825.208(b)(2).

Under the statute, the employer complies by granting leave when the employee requests it. Given the statute's explicit posting requirement, the employer does not compromise the employee's rights under the statute simply by failing to notify that the leave is "FMLA-covered" up front. DOL's regulations actually encourage employees not to mention the FMLA with the hope that they can receive FMLA protected leave indefinitely.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully urge that the judgment below be upheld with the direction that the Secretary of Labor's FMLA notice regulations are invalid and cannot be enforced.

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October 5, 2001